Supreme Court of the United States

October Term, 1909

No. [redacted]

THE DISTRICT OF COLUMBIA, Plaintiff in Error,

vs.

LEIGH ROBINSON and CONWAY ROBINSON, as Executors of the Will of CONWAY ROBINSON, Deceased.

Reply to Brief of Defendants in Error.

10729

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 86.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

LEIGH ROBINSON AND CONWAY ROBINSON, JR., EXECUTORS OF THE WILL OF CONWAY ROBINSON, DECEASED.

Reply to Brief of Defendants in Error.

It seems there was a mistake in the statement contained in our brief (page 1) respecting the date of the overruling of the demurrer.

The original declaration was filed August 28, 1882. Pleas were filed October 2, 1882 (Rec., p. 6). Issue was joined on the first plea and demurrer filed to the second plea October 11, 1882 (Rec., p. 7). Joinder in demurrer was filed January 26, 1883 (Rec., p. 61). Demurrer was sustained March 10, 1883 (Rec. p. 61). Conway Robinson died January 30, 1884, and his death was suggested February 18, 1884 (Rec., p. 8), and nothing was done until July 5, 1884, when the executors took the order (Rec., p. 62) that the suit stand revived in their name and be in the same plight and condition as when their testator died. After delaying until November 28, 1884, leave was asked to amend the declaration, indicating a purpose not to stand by the original declaration, and nearly two years thereafter,

on October 29, 1886, the original declaration was abandoned by filing the "amended declaration" (Rec., p. 8), upon which the case was tried. Here was a period of delay in prosecution from January 30, 1884, to October 26, 1886, more than two years, for which the District of Columbia was in no way responsible.

The attorney for the plaintiff in error did not say in oral argument, as stated in Brief of Defendants in Error (page 2), that no appearance had been entered or proceeding had from the suggestion of death to the filing of the amended declaration. He did say, however, that the action had abated; and so it had, subject to the right of revival.

The delays in the case can by no possibility be attributed to the plaintiff in error, as suggested in the "Supplemental Brief" (page 16).

The record does not show it, if the "case from the beginning to the end has been a hotly contested one;" its heat at the beginning and for sixteen years was not sufficient to generate movement enough to bring it to trial. The delay in its trial was not due to "indulgence extended" to attorneys for plaintiff in error.

As to the Twelfth Prayer of Defendants in Error.

The comments of Alvey, C. J., on this prayer are found in our brief (page 35).

There was manifest error in this prayer, and it undoubtedly misled the jury. The prayer (Rec., p. 51–52) contains eight distinct propositions, *any one* of which the jury were told if believed by them--

> "would tend to prove that said lane or road was *not a common or public highway* and would tend to rebut *any* presumption of its being a common or public highway, and any and all such facts, if believed by the jury, are to be considered in connection with the other evidence in the case, and if the jury upon the whole evidence believe that said lane or road was not such a highway at the time of the acts complained

> of which have been given in evidence, and was not a highway by dedication, then they should find the issue joined upon the defendant's *third additional plea of highway* in favor of the plaintiffs."

The trial court, in explaining this prayer to the jury (Rec., p. 52), said:

> "Gentlemen, that is a long instruction, but it is very simple. It recites merely the facts which the plaintiffs rely upon to rebut the *presumption of a grant* or to rebut the idea of a road *by prescription* being there. The instruction does not tell you that if you find those to be true that there is no road by prescription, but the instruction tells you that you are to consider all those facts recited there; that they have a tendency *to rebut the idea of prescription*, and that you should consider them in connection with all the other evidence in the case that tends to *show prescription*, and that tending against it, if there be any that is not, recited in that instruction, and that is for you to say, when you have considered all those matters together, *whether there is* a road there by *prescription*. That is what that instruction means"—

thus explaining that the "common or public highway," referred to in said prayer, was one by *dedication* or by *prescription*.

The court instructed the jury that any one of the eight enumerated propositions, if believed by them, would tend to rebut any presumption of Harewood road being a common or public highway.

We respectfully submit that several of these propositions plainly had no such tendency, and were entirely inapplicable and immaterial.

Let us examine some of them as applied to a highway acquired by prescriptive use for twenty years:

The *first* proposition was, that if the jury believed that travel over the lane or road originated for the accommodation of some prior owners, etc.

The proposition should have been, "if the travel originated *exclusively* for the accommodation of some prior owner or owners." For most roads originate for the accommodation of the owners of the land.

The *third* proposition was, that if the owners of the land had conveyed the same with covenants of warranty without mentioning the lane or road, etc.

There was no conveyance of this property within the period of twenty years prior to the alleged trespasses. The last deed, which was the deed to the testator, Conway Robinson, was on May 15, 1857 (Rec., p. 23).

The *fourth* proposition was, that if the location of the lane or road was changed by Mr. John Agg, etc.

But this was not within the period of twenty years before the alleged trespasses, for Agg died before 1855 (Rec., p. 19).

The *fifth* proposition was, that if gates were maintained across the road "from about 1843 to about the time of the conveyance of May 15, 1857," etc.

But this was outside of the period of twenty years before the date of the alleged trespasses.

The *seventh* proposition was, that if "acts of ownership were exercised by the plaintiff's testator over the land within the limits of the road,"—without stating *what* acts of ownership and *when*.

Furthermore, the court in this prayer told the jury that any one of the facts contained in these several propositions of belief *without regard to its probative force* would tend to rebut *any* presumption of a public highway.

All of which is respectfully submitted.

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